IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04...09..2007

Coram

The Honourable Mr.Justice K.RAVIRAJA PANDIAN
and
The Honourable Mrs.Justice CHITRA VENKATARAMAN

W.P.No. 21339 of 2004

M/s.Fedders Lloyd Corp. Limited
rep. By Mr.P.K.Eappen
Authorised Signatory and
Nodal Accountant .. Petitioner

versus

1. The Registrar
Tamil Nadu Taxation Special Tribunal
Singaravelar Maligai
Chennai-2.

2. The Sales Tax Appellate Tribunal
(Main Bench)
City Civil Court Buildings
Chennai-104.

3. The Commercial Tax Officer
Nungambakkam Assessment Circle
Chennai-31.

4. The Deputy Commissioner of Commercial
Taxes, Madras (Central) Division
Commercial Taxes Building
Greams Road
Madras -6. .. Respondents

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Petition under Article 226 of the Constitution of India praying to issue a writ of certiorari to call for the records on the file of the first respondent in T.C(R) No. 2144/97 dated 3.10.2001 and quash the same as being invalid and illegal.

For Petitioner : Mr.V.Srikanth

For Respondents : Mr.Tholgappian, Govt. Advocate for Taxes

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ORDER

(The order of the Court was delivered by CHITRA VENKATARAMAN,J)

The writ petition is against the order of the Tamil Nadu Taxation Special Tribunal, Chennai, confirming the order of the Sales Tax Appellate Tribunal on the assessment made under Section 12-A of the Tamil Nadu General Sales Tax Act,1959.

2. This writ petition relates to the assessment year 1979-80. The petitioner herein is a dealer in Air-Conditioners and Refrigerators. The petitioner was assessed on the total and taxable turnover of Rs.1,06,57,485/- and Rs.60,94,121/- respectively by the third respondent, Commercial Tax Officer, Nungambakkam, by invoking the provisions of section 12-A of the Act in respect of the sales effected by the petitioner to a wholesale dealer viz., Lloyds Sales Corporation. Comparing the price on the sales to the Lloyds Sales corporation with that of one charged for the Defence Canteen Stores Department, the third respondent came to the conclusion that there was sufficient evidence to prove that there was under-invoicing of the price on the sale to Lloyd Sales Corporation. Thus, the statutory best of judgment assessment under Section 12-A was adopted to fix the taxable turnover at Rs.63,60,380/-.

3. It is stated that the place of business was inspected by Enforcement Wing officials on 15.11.1984 which revealed different price rates in the sales of Air Conditioners and Refrigerators. The sales to Lloyd Sales Corporation were on the cost price, whereas, in respect of sales to the Defence Canteen Stores Department, the price charged included transit insurance, freight charges etc. In the circumstances, the third respondent held that the price charged as regards the sales to Lloyd Sales Corporation was low when compared to the market price prevailed at that time and the said rate was adopted to evade payment of tax.

4. The petitioner preferred an appeal before the Appellate Assistant Commissioner (CT) III, questioning the assessment under Section 12-A. He however rejected the appeal on merits and thereby confirmed the assessment. The petitioner preferred a further appeal to the Sales Tax Appellate Tribunal, Chennai. By order dated 28.5.1990, the Sales Tax Appellate Tribunal allowed the appeal on the ground that the sales to Lloyd Sales Corporation could not be compared with that of the Defence Canteen Stores Department. It also pointed out that the price charged for by the petitioner was uniform throughout India. Hence, there was no motive for the petitioner to evade tax. The Tribunal held that the conditions necessary for making an assessment under Section 12-A were not shown to exist and hence, cancelled the assessment.

5. The Revenue preferred a revision before the Tamil Nadu Taxation Special Tribunal, Chennai. By order dated 3.10.2001, the Tamil Nadu Taxation Special Tribunal allowed the appeal preferred by the State.

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6. Aggrieved by the order of the Tamil Nadu Taxation Special Tribunal, the assessee has now preferred this writ petition challenging the said order on the ground that the Tamil Nadu Taxation Special Tribunal erred in not following the decision of this Court reported in 105 STC 337 (JAYALAKSHMI TRADERS v. GOVERNMENT OF TAMILNADU) while considering the merits of the case. The writ petitioner further states that the Tribunal erred in placing reliance on Rule 18-C of the Tamil Nadu General Sales Tax Rules, which was not in force during the relevant year viz., 1979-80, but introduced only from July, 1982. Further, the assessee pointed out that in the absence of any determination of the market price and comparing the same with the price charged for by the petitioner on its sales to Lloyds Sales Corporation and in the absence of any finding on the aspect of mala fide intention to evade tax, the respondents cannot fix the liability by invoking Section 12-A of the Act.

7. Learned counsel appearing for the petitioner, referring to Section 12-A of the Act submitted that the assessment under Section 12-A itself would arise only when the Assessing Officer has definite materials to raise a presumption as to the conduct of the assessee that the charging of the price below the present market price was to evade the tax liability.

8. He also placed reliance on the decision reported in 105 STC 337 (JAYALAKSHMI TRADERS v. GOVERNMENT OF TAMILNADU), AIR 1974 SC 1358 (I.T. COMMR., W. B v. CAL DISCOUNT CO.)and 263 ITR 706 (UNION OF INDIA v. AZADI BACHAO ANDOLAN) in support of his case that the Assessing Authority went wrong in invoking Section 12-A of the Act as a matter of course without observing the conditions stated in the provision. He pointed out that the assessment lacked material particulars which are necessary to frame the assessment under Section 12-A of the Act. Referring to the order of the Tamil Nadu Sales Tax Appellate Tribunal, learned counsel pointed out that on the face of the findings of the Tribunal, the Special Tribunal ought to have rejected the revision. He pointed out that there were no materials for the Tamil Nadu Taxation Special Tribunal to have a view different from that of the Sales Tax Appellate Tribunal.

9. Per contra, learned Special Government Pleader appearing for the respondent, submitted that when the price charged for by the petitioner on its sales to Lloyds Sales Corporation is much lower in comparison with the one charged for at the hands of the Defence Canteen Stores Department, the criteria specified for invoking Section 12-A are fully satisfied; that applying the decision of this court only, the Tamil Nadu Taxation Special Tribunal had come to the right conclusion and hence, in the absence of any material to counter the facts found, the order of the Tamil Nadu Taxation Special Tribunal could not be faulted with. Hence, he prayed for dismissal of the writ petition.

10. Heard the learned counsel for both sides and perused the records.

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11. Before adverting to the rival contentions, we may have to look at Section 12-A of the Act and the interpretation placed by this Court on the scope of this provision.

12. Section 12 A(1) of the Act reads as follows:-

> "If the assessing authority is satisfied that a dealer has, with a view to evade the payment of tax, shown in his accounts, sales or purchases of any goods, at prices which are abnormally low, compared to the prevailing market price of such goods, it may, at any time within a period of five years from the expiry of the year to which the tax relates, assess or reassess the dealer to the best of its judgment on the turnover of such sales or purchases after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment. "

13. This is a machinery provision intended to determine the statutory best of judgment assessment in cases, where, on comparison with the prevailing market price, the consensual price of goods sold were found as abnormally low. The said Section was inserted in this Act from 3rd December 1979 with the object of assessing or reassessing cases where the dealer had shown in his accounts sales or purchases of goods at abnormally low prices with a view to evade payment of tax.

14. Section 12-A came up for consideration before this Court in a decision reported in 105 STC 337 (JAYALAKSHMI TRADERS v. GOVERNMENT OF TAMILNADU). Upholding the validity of this provision, this Court held that,

> " A reading of the provision contained in Section 12-A of the Act will clearly show that it is only a machinery provision intended to determine whether the returns submitted by a dealer are true and correct and they represent the consensual price of the transactions. As already pointed out, it is intended to prevent the evasion of payment of tax and for that purpose it empowers the assessing authorities to compare the price mentioned in the accounts relating to sale or purchase of goods as stated in the return submitted with the prevailing market price of such goods, and to make best of judgment assessment on the turnover, after such enquiry as the assessing authority may consider necessary, that too, after giving a reasonable opportunity to the dealer to show cause against such assessment....."

This Court, at page 347, further held that,

> ".....In effect the entire exercise under Section 12-A of the Act is to determine whether there is an attempt on the part of the dealer to evade the payment of sales tax. This exercise is undertaken when a doubt is entertained about the bona fide and true nature of the sales shown in the accounts at low price. ....."

This Court, at paragraph 28, further held that,

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"While determining the real consensual price, when compared with the prevailing market price, the price at which similar goods are sold by the retailers and the price at which the goods are sold by wholesalers, cannot be the comparable price for the purpose of determining the real consensual price of the wholesaler. Similarly the price at which the wholesaler has sold the goods shall not also be the prevailing market price for the purpose of determining the real consensual price of the retail seller."

15. On the interpretation of the similar provision contained in Section 52 of the Income Tax Act, 1961, which was referred to by the Division Bench, in the decision reported in [1981] 138 ITR 597 (K.P.VARGHESE v. INCOME TAX OFFICER, ERNAKULAM), the Apex Court held that Section 52(2) could not be invoked by the Revenue unless there was under-statement of the consideration in respect of transfer and that the burden of showing that there was an under-statement was on the Revenue to establish that the consideration actually received by the assessee was much more than what was disclosed in the document. In the face of the clear-cut pronouncement of this Court on the scope of Section 12-A of the Act and the interpretation placed by the Apex Court on a similar provision under the Income Tax Act, 1961, it is clear that the invoking of Section 12-A necessarily rests on a presumption that the price charged for by the assessee as shown in the accounts is abnormally low when compared to the prevailing market price. Such a presumption has to be drawn from the materials available with the Revenue enabling a determination of the market price and the comparison of the same with the price charged for by the assessee in terms of the guidelines given by this Court in the decision reported in 105 STC 337 (JAYALAKSHMI TRADERS v. GOVERNMENT OF TAMILNADU). Further, the Apex Court held that every difference in price on comparison as abnormally low, per se, does not point out to a tax evasion. Factors must exist there to point out that the charging of abnormally a low price compared to the prevailing market price was with a view to evade payment of tax.

16. Learned counsel for the petitioner drew our attention to the decision reported in AIR 1974 SC 1358 (I.T. COMMR., W. B v. CAL DISCOUNT CO.), particularly at page 1361, to impress on the fact that the law does not prohibit avoidance of tax liability by so arranging the commercial affairs that charge of tax is distributed. The law does not oblige a trader to make maximum profit out of his trading transactions. In the circumstances, even if there be any difference, no exception could be taken unless there are materials to point out the mala fide intention to evade payment of tax.

17. Learned counsel also referred to the decision reported in 263 ITR 706 (UNION OF INDIA v. AZADI BACHAO ANDOLAN),wherein, referring to the first McDowell case reported in [1985] 154 ITR 148, the Apex Court held that an underlying motive cannot be attributed on a supposedly resulting in some prejudice to the Revenue by reason of comparison of prices on transactions. He submitted that incomparables cannot be compared for the purpose of invoking Section 12-A of the Act.

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18. We agree with the contention raised by the learned counsel for the petitioner.

19. A perusal of the order passed by the Assessing Authority shows that on 15.11.1994, the business premises was inspected by the Enforcement Wing Officials. The assessee has its Head Office at New Delhi. They received Air-Conditioners and Refrigerators for sales at Madras on Southern Zone. The charges are prepaid by the Head Office. The charges are recovered by the assessee by raising debit notes. The Madras office sells its units to one of the sister concerns viz., Lloyd Sales Corporation and some units to the Defence Canteen Stores Department, Madras. Learned counsel for the petitioner objected to the reference of Lloyd Sales Corporation as a sister concern of the petitioner. The Assessing Authority pointed out that the petitioner charged cost price alone in respect of the sales effected to Lloyd Sales Corporation. In respect of sales to the Defence Canteen Stores Department, the pre-sale charges are however included along with the profit margin. Comparing this price, the Revenue drew the inference that the price charged for by the petitioner was very low when compared to the market price prevailing at that time and that Lloyd Sales Corporation had sold the units at a high profit margin as second sales of single point goods.

20. Incidentally, it may be pointed out that except for comparing the price on the sales to Lloyd Sales Corporation with the one to the Defence Canteen Stores Department, we do not find any exercise by the Assessing Officer in fixing the market price as required under the Section. It is pertinent to note that the Assessing Officer remarked that,

> "..... In so far as this commodity is concerned, this question of comparing like products in the market does not arise because pricing of commodities of this nature would vary from company to company according to overheads. Therefore, comparison of price structure with reference to market price is the only reasonable way to establish under-invoicing....."

21. The fact remains that except for comparing the sales of the petitioner, one to the Lloyd Sales Corporation and other to the Defence Canteen Stores Department, there is admittedly no exercise undertaken as required under Section 12-A of the Act to determine the market price for the purpose of comparison. The order of the Appellate Assistant Commissioner is no better.

22. A perusal of the order of the Tribunal in the appeal preferred by the assessee shows that as per the agreement between the petitioner and Lloyd Sales Corporation as a wholesale dealer, the said Lloyd Sales Corporation would deal with the goods all over the country at the price mentioned in the price list published by the manufacturer viz., petitioner as applicable from time to time.

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23. The sales effected to the said Lloyd Sales Corporation was out of the bulk transfers effected to branches from the Head Office at New Delhi. As regards the sales to the Defence Canteen Stores Department and the Government Department, the petitioner sold at the prices fixed by the Head Office and added thereon freight, transit insurance charges, handling charges, sales tax and surcharge at the appropriate rates. On the contention of the Revenue that the petitioner had sold at abnormally low price, the Tribunal pointed out that the Assessing Officer had not taken any efforts to compare the price offered by other competitors; instead, the Assessing Authority opined that the prices for goods offered by other companies varied according to their overheads. Hence, the assessing authority concluded that the only way to establish under-invoicing was with reference to the comparison of the price structure with the price offered to others. A perusal of the orders of the authorities below show that the Assessing Officer had not had materials to substantiate the assessment under Section 12-A of the Act. The Tribunal rightly came to the conclusion that the Assessing Officer failed to let in evidence to substantiate the allegation as well as to fix the market price. As to the allegation that the assessee had sold the goods at a low rate, the Tribunal perused the comparative statement of price and found that the price charged by the petitioner is an uniform one throughout the country and not low. Thus, on a finding of fact that the Assessing Authority had not complied with the requirements of Section 12-A of the Act in determining the market price in making comparison of the price charged by the petitioner with that of the similarly placed dealer and that there was no finding as to the lack of bona fide as to the conduct of the assessee, the Tribunal rightly held that the assessment could not be sustained.

24. A reading of the order of the Tamil Nadu Taxation Special Tribunal shows that it misdirected itself in not adverting to the requirements under Section 12-A of the Act that the statutory best of judgment assessment itself rests on the comparison of the price charged by the assessee with the market price determined on the basis of materials available with the assessing authority. There was no material to suggest lack of bona fides and that the transactions were aimed at tax evasion. The Tamil Nadu Taxation Special Tribunal totally erred in its approach when it held that the comparison of rates charged by others with that of the petitioner would not be a safe guide to determine the market price. It must be noted that although the Rules relating to Section 12-A of the Act were introduced only with effect from 1.10.1984, yet, the Revenue is bound to determine the market price for a comparison to ultimately arrive at a finding on the bona fides of the transactions.

25. As already seen, a mere difference in prices charged by the petitioner from the market price does not automatically lead to invoking of Section 12-A of the Act. There is hardly any finding recorded by the Tamil Nadu Taxation Special Tribunal as regards this aspect. It totally misdirected its attention to make the comparison of the price charged for Defence Canteen Stores Department for Zenith-165 litre capacity refrigerator with that of the price charged by the petitioner. Learned counsel for the petitioner rightly pointed out that the petitioner is a

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wholesale dealer and the price charged for by the petitioner as regards its sales to Lloyd Sales Corporation must be compared with the sales to similarly placed persons in terms of the guidelines as held by the Division Bench in the decision reported in 105 STC 337 (JAYALAKSHMI TRADERS v. GOVERNMENT OF TAMILNADU). The price charged by the retailers cannot be compared with the price charged by the wholesalers.

26. In the above circumstances, we do not agree with the view of the Tamil Nadu Taxation Special Tribunal. Consequently, we set aside the order of the Tamil Nadu Taxation Special Tribunal dated 3.10.2001 passed in T.C.(R) No. 2144 of 1997. In the circumstances, we allow the writ petition. No costs. Connected W.P.M.P.Nos.25781 and 42868 of 2004 are closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. THE REGISTRAR, TAMILNADU
TAXATION SPECIAL TRIBUNAL,
SINGARAVELAR MALIGAI,
CHENNAI 2

2. THE SALES TAX APPELLATE
TRIBGUNAL, (MAIN BENCH)
CITY CIVIL COURT BUILDINGS
CHENNAI 104

3. THE COMMERCIAL TAX OFFICER,
NUNGAMBAKKAM ASSESSMENT CIRCLECHENNAI 31

4. THE DEPUTY COMMR. OF COMMERCIA
TAXES, MADRAS CENTRAL DIVN.,
GREAMS ROAD, CHENNAI 6

1 CC To Mr.C.Venkatraman, Advocate, SR NO.54861.
1 CC to the Spl. Government Pleader(Taxes), SR NO.55153.

W.P.No. 21339 of 2004

JSK(CO)
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